Comments on the 1968 Draft Convention on the Law of Treaties

Non-binding Agreements

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At the 1968 Vienna Conference for the Codification of the Law of Treaties the Committee of the Whole deferred voting on draft art. 2. Therefore the definition or – as some delegates understood the scope of that article – the use of the term "treaty" (para. 1 subpara. a) has been left in suspense and probably will be the matter of some discussion.

Among the different points which in this context were debated during the preparation of the draft and which are likely to reappear in the negotiations of the second part of the Conference, the present writer proposes to treat one whose relevancy may not be readily apparent, since the International Law Commission (ILC) dropped it from the ambit of its deliberations. That is the criterion for determining whether a text emerging from and expressing an agreement between representatives of States has any binding force at law.

1. Fawcett[1]) wrote in 1953 that an international agreement is not to be presumed as having legal force; Renata Sonnenfeld[2]), on the other hand, maintained that every international agreement is binding. It is submitted that we may safely discard these two extreme propositions; doctrine[3]) and practice[4]) admit of the existence of non-binding agreements,

[1]) The Legal Character of International Agreements, The British Year Book of International Law (BYBIL) vol. 30, pp. 385, 388. H. Lauterpacht disagreed with this opinion, Yearbook of the International Law Commission (YBILC) 1954 II, pp. 125 *et seq.* para. 12.

[2]) "Gentleman's agreement" a umowy międzynarodowe, Sprawy Międzynarodowe, vol. 11 no. 12, p. 44.

[3]) S. Bastid, Cours de droit international approfondi (1959), pp. 182 *et seq.;* Berber, Völkerrecht, vol. 1, p. 412; Dahm, Völkerrecht, vol. 3, p. 7; Menzel, Völkerrecht, p. 181; O'Connell, International Law, pp. 222 *et seq.;* Oppenheim-Lauterpacht, International Law (8th ed.) vol. 1, pp. 873, 899; Ch. Rousseau, Droit international public, p. 19; P. Vellas, Droit international public, p. 101; Restatement of the Law, Second, Foreign Relations Law of the United States (1965) § 115 f and g. Special works: Bittner, Die Lehre von den völkerrechtlichen Vertragsurkunden,

called declarations of intention, political declarations, gentlemen's agreements and so on, which are not in any manner clearly defined.

In the draft art. 2 para. 1 subpara. a, the legal element necessary to any treaty is now alluded to by the words "governed by international law", but nowhere is it said when an agreement is governed by international law.

2. Certainly the International Law Commission did not overlook the problem. From the beginning of its work on the law of treaties members had pointed to the existence of agreements not intended to create obligations at law [5]), and some of the Special Reports mention this class of texts [6]).

Unfortunately, some confusion arose from the simultaneous discussion of another class of transactions which does not enter the sphere of international law. Many members called the attention of their colleagues to agreements between States on commercial and private business objects which, so to speak, naturally have to be governed by some municipal law.

The wording in the definition of the international treaty "intended to create legal rights and obligations of the parties" [7]) was meant originally to exclude the mere political declarations as well as the municipal law contracts. But in the course of time, attention centered on the latter alone, as is shown by the discussion of 1959 [8]) and some subsequent reports [9]), and the question of the political declarations was dropped at last as being too difficult [10]). A few States, in their observations on the draft articles, have suggested going back to the intention to create obligations at law as a

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p. 63 note 236; McNair, Law of Treaties (1961), p. 6; Satow, A Guide to Diplomatic Practice (4th ed.), pp. 324 *et seq.* Articles on particular subjects: Briggs, The American Journal of International Law (AJIL) vol. 40, p. 376; Colliard, Annuaire français de droit international, vol. 1, p. 71; Green, Current Legal Problems (1960), p. 255; Johnson, BYBIL vol. 35, p. 4; Lauterpacht, The International and Comparative Law Quarterly (ICLQ) vol. 8, p. 186; Myers, AJIL vol. 51, p. 605; O'Connell, AJIL vol. 50, pp. 407, 413 and BYBIL vol. 29, pp. 424 *et seq.*; Pan, AJIL vol. 46, pp. 40 *et seq.*; Pinto, Journal du droit international, vol. 86, pp. 316, 322; Virally, Recueil d'études de droit international en hommage à Paul Guggenheim (1968), pp. 534 *et seq.*

[4]) See Kiss, Répertoire de la pratique française en matière de droit international public, vol. 1 nos. 104–109, 123, 124, 1166–1168, 1171, 1172 and below the examples alluded to in sections 4 and 5 of this paper. See also the incident mentioned by Lissitzyn, AJIL vol. 61, p. 902.

[5]) Córdova, YBILC 1950 I, p. 69 para. 11; Elias, YBILC 1962 I, p. 52 para. 26; Briggs, YBILC 1965 I, p. 10 para. 10.

[6]) Brierly, YBILC 1950 II, p. 228 para. 29; H. Lauterpacht, YBILC 1953 II, p. 96 para. 4.

[7]) YBILC 1953 II, p. 90; 1954 II, p. 123; 1956 II, p. 107; 1959 I, p. 26.

[8]) YBILC 1959 I, pp. 34 *et seq.*

[9]) YBILC 1962 II, pp. 32, 163 (see also I, p. 53 para. 32 and pp. 170 *et seq.*), 1966 II, p. 189 para. 6. It was recalled in YBILC 1965 II, p. 12 para. 6.

[10]) YBILC 1959 II, pp. 96 *et seq.*

criterion of international treaties [11]), and in the ILC as well as at Vienna some voices recommended following that idea [12]). Thus it may be that this point will still receive some attention.

3. The discussions in the ILC do not yield any element for the definition of criteria for determining the legally binding effect of an agreement.

The positive intent to enter into a legally binding agreement, which was the topic of the ILC's discussion, is not usually, contrary to Fawcett's opinion, expressed in the texts. At most a negative declaration would be important: that is, a statement that the agreement now concluded was not supposed to be legally binding [13]). However, such an expression of negative intent will very rarely occur. In practice the parties to an agreement do not manifest their interpretations regarding the character of the agreement; if one were thus to rely, when a dispute arose, upon the intention of the parties, then it would be too easy for either side to assert that it had not intended to be legally bound.

The designation of the agreement is immaterial to the question. The ILC, in conformity with recent theory and practice [14]), adopted this position by the use of the wording "whatever its particular designation" at the end of art. 2 para. 1 subpara. a) of its draft. Perhaps one could give weight to the use of the term "declaration of policy" as it occurred in the exchange of notes between Great Britain and Spain of 16 May 1907 [15]) because this seems to be one of the exceptional cases in which a party to an agreement unveiled its opinion regarding the character of the act, that is to say, in the sense that the act was not to be legally binding. Still, H. Lauterpacht holds that even such a declaration may have binding effect [16]).

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[11]) YBILC 1965 II, pp. 10 *et seq.*: Australia, Austria, Luxemburg and United Kingdom.

[12]) Briggs, YBILC 1965 I, p. 10 para. 10; the delegates of Chile and Mexico at the 4th meeting of the Committee of the Whole when introducing the amendments L. 22 and L. 33, A/CONF. 39/C. 1/SR 4.

[13]) Cf. below the tripartite understanding of 1907 at notes 15 and 19.

[14]) Myers, *loc. cit.* (note 3 above), p. 576 lists no less than 39 terms of which anyone may designate a legally binding text, but must not necessarily do so. See also J. Basdevant, Rec. d. C. vol. 15, p. 616; S. Bastid, *loc. cit.* (note 3 above), p. 66; L. Cavaré, Le droit international public positif, vol. II (2nd ed.), p. 46; L. Delbez, Les principes généraux du droit international public (3rd ed.), p. 314; Hackworth, Digest of International Law, vol. 5, p. 1; Kiss, *loc. cit.* (note 4 above), p. 64 no. 119; J. L'Huillier, Eléments de droit international public, p. 171; McNair, *loc. cit.* (note 3 above), p. 22 *et seq.*; O'Connell, *loc. cit.* (note 3 above), p. 211; Oppenheim-Lauterpacht, *loc. cit.* (note 3 above), p. 898; P. Reuter, Droit international public, p. 42; Ch. Rousseau, *loc. cit.* (note 3 above), p. 18; Satow, *loc. cit.* (note 3 above), p. 324 *et seq.*; M. Sibert, Traité de droit international public, vol. 2, p. 180; P. Vellas, *loc. cit.* (note 3 above), pp. 99–101.

[15]) See below at note 19.

[16]) Second Report, YBILC 1954 II, p. 125 para. 8.

The fact that the agreement has been concluded without the participation of the representation of the people – Scelle[17]) appeared to place great weight on this factor – is not important because the Executive often has wide ranging authority, and a duty to investigate whether he has acted *ultra vires* is generally rejected under international law. Arts. 6 para. 2, 43 and 44 of the ILC draft leave little room for the argument that *ultra vires* could be a ground for nullity of an agreement. Moreover, where *ultra vires* might be such a ground, it is not one of the criteria sought here; the ILC assumed that even an agreement *ultra vires* could be a "treaty", which would mean an instrument having legal importance.

4. In the practice and literature examples can be found for non-binding agreements, but up to now none appear to have been convincingly substantiated.

Of some interest is the draft which the French ambassador to Spain prepared early in 1907 for a tripartite declaration by France, Great Britain and Spain concerning the maintenance of the territorial *status quo* in the Mediterranean and in North Africa[18]). According to this draft declaration the parties were to agree not to withdraw from any of their territories in those regions and to consult if the *status quo* was put in question. In the accompanying report the ambassador expressed the opinion that this "arrangement" would not be a treaty.

Out of these negotiations originated the French-Spanish and the British-Spanish exchange of notes of 16 May 1907[19]) which substituted for the duty not to withdraw from any territory a declaration that it was the general policy *(politique générale)* of the parties to maintain their territorial possessions. The exchanged texts were denominated "declarations" with the British Government using the expression "declaration of policy". This did not prevent the French Government from speaking of an *accord*[20]) – just as in the ILC draft "agreement" is the general term for the legally relevant treaty as well as for the declared mutual consent which is not legally binding.

The Singapore Court of Appeal held in *N.V. de Bataafsche* v. *The War Damage Commission*[21]) that the Inter-Allied Declaration against Acts of

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[17]) YBILC 1950 I, p. 73 paras. 39 e and 42, p. 83 para. 7 a, b; 1951 I, p. 14 para. 36.

[18]) Kiss, *loc. cit.* (note 4 above) vol. 1 no. 124.

[19]) Descamps-Renault, Recueil des Traités du XXe Siècle (1907), pp. 370, 373; Martens, Nouveau Recueil Général, II. Series, vol. 35, p. 692 and III. Series, vol. 1, p. 3.

[20]) In the instruction to the embassies with the great powers and Portugal, Martens, *loc. cit.* vol. 35, p. 692.

[21]) International Law Reports 1956, pp. 810, 826. For comments on this point see ICLQ 1956, p. 88.

Depossession of 5 January 1943 had not the binding force of an international treaty.

The agreements resulting from the 1943 Cairo Conference have been described in various statements of the British Government as not legally binding and as mere statements of intention [22]). Dulles apparently had in mind results of the Conferences of Cairo, Yalta and Potsdam when he stated [23]): "There have been some private understandings between some Allied Governments, but by these Japan was not bound, nor were other Allies bound". Nutting and Ormsby-Gore in their statements cited in note 22 characterize the Potsdam Protocol of 2 August 1945 along with the Cairo agreements as a statement of intention.

The United Nations Declaration on Human Rights of 10 December 1948 is not legally binding [24]).

Representatives of the French Government have declared as not legally binding the French-Italian Protocol from Turin of 20 March 1948 regarding the customs union [25]) as well as para. 7 (regarding voting) of the Final Act of the Geneva Conference on Vietnam of 21 July 1954 [26]).

Generally *déclarations de principe* have not been considered in the French diplomatic practice as being legally binding [27]), nor have *recommendations* been so considered in the French jurisprudence [28]).

5. In the literature there has been disagreement or doubt about the legally binding effect of the following acts, among others:

The Lansing-Ishii agreement on immigration of 2 November 1917 [29]), the Atlantic Charter [30]), the Cairo agreements of 1943 [31]) and the Yalta agreements of 1945 [32]), the declaration of the Allied of 5 June 1945 [33]) and

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[22]) Churchill (Hansard, Commons vol. 536 col. 901); Eden (*loc. cit.* Written Answers col. 159); Nutting (*loc. cit.* vol. 548 col. 602); Ormsby-Gore (*loc. cit.* vol. 572 col. 209); Selwyn Lloyd (*loc. cit.* vol. 595 col. 1140).

[23]) Department of State Bulletin, vol. 25, p. 454.

[24]) Kiss, *loc. cit.* (note 4 above) nos. 1167, 1168.

[25]) Kiss, *loc. cit.* no. 105 – this is particularly convincing because this Protocol served as the basis for drafting the treaty of 26 March 1949 which never entered into force.

[26]) Kiss, *loc. cit.* no. 104.

[27]) Kiss, *loc. cit.* no. 102 = 1166 (a statement made in the year 1881).

[28]) Kiss, *loc. cit.* nos. 108, 109, 1171–1174.

[29]) Ch. Rousseau, *loc. cit.* (note 3 above), p. 19.

[30]) S. Bastid, *loc. cit.*, p. 70; McNair, *loc. cit.*, p. 6; Ch. Rousseau, *loc. cit.*, p. 19; Satow, *loc. cit.* (note 3 above), p. 324; Schlochauer in Strupp-Schlochauer, Wörterbuch, vol. 1, p. 95 citing more authors; Sepúlveda, A/CONF. 39/C. 1/S. R. 4; Virally, *loc. cit.* (note 3 above), p. 534.

[31]) O'Connell, BYBIL vol. 29, p. 424.

[32]) S. Bastid, *loc. cit.*, p. 190; Briggs, AJIL vol. 40, pp. 376 *et seq.*, 382; O'Connell, AJIL vol. 50, p. 413 and BYBIL vol. 29, pp. 424, 426; Pan, *loc. cit.*

the Potsdam Protocol of 2 August 1945 [34]), the United Nations Declaration on Human Rights [35]), the purported gentlemen's agreement of 1946 on the distribution of non-permanent seats on the Security Council [36]), the Potomac Charter of 29 June 1954 [37]) and the declarations of the Western Powers on the exclusive representation of the German People by the Federal Government [38]).

It is not the intention here to discuss whether the above-listed acts have been correctly classified; the enumeration can do no more than to serve as an indication of the direction in which the search for criteria to determine the legally binding effect of an agreement should be aimed. With regard to the Atlantic Charter it should perhaps be noted that the drafters themselves had every reason to deny a legally binding effect. For if the Charter were legally binding, then it would also have to be understood as *in favorem tertii,* which would have given the defeated nations at the end of the Second World War a right to their territorial inviolability. The same awkward discussion as that regarding the binding effect of Wilson's 14 Points for the peace treaties after the First World War would have been unavoidable [39]).

6. The present author attempted [40]) to distill the figure of the non-binding agreement out of the anglo-saxon jurisprudence on municipal law [41]). However, the cases *United States* v. *United States Steel Corporation* (223 F 55), *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ltd.* ([1923] 2 KB 261), *Jones* v. *Vernon's Pools Ltd.* ([1938] 2 AEL 626 KB), *Balfour* v. *Balfour* ([1919] 2 KB 571) and *Coward* v. *Motor Insurance Bureau* ([1963] 1 QB 259) only showed that the opinion of the parties to an agreement regarding its legally binding effect was insignificant; even in *Rose &*

(note 3 above), p. 50; Restatement, *loc. cit.* (note 3 above) § 115 f); Scelle, YBILC 1950 I, p. 73 paras. 39 e and 42.

[33]) Fawcett, *loc. cit.*, p. 394.

[34]) S. Bastid, *loc. cit.*, p. 190; O'Connell, AJIL vol. 50, p. 407, and BYBIL vol. 29, p. 424; Restatement, *loc. cit.* § 115 f); Virally, L'administration internationale de l'Allemagne, p. 33.

[35]) Satow, *loc. cit.*, p. 325.

[36]) Green, *loc. cit.* (note 3 above), see also what was said in the House of Commons, Hansard vol. 469 col. 2229, 3303 and vol. 470 col. 349.

[37]) McNair, *loc. cit.*, p. 6; Satow, *loc. cit.*, p. 325.

[38]) R. Pinto, Journal du Droit international, vol. 86, pp. 316 *et seq.*, 322; Briggs, AJIL vol. 49, p. 53.

[39]) It is interesting to note that Myers, AJIL vol. 51, p. 605 note 145, accords the Charter treaty status up until the capitulation of Germany.

[40]) F. Münch, Unverbindliche Abmachungen im zwischenstaatlichen Bereich, Mélanges offerts à Juraj Andrassy (1968), pp. 218 *et seq.*

[41]) See Chitty, On Contracts (21st ed.), p. 17; Williston, On Contracts (3rd ed.) vol. 1 § 21.

Frank Co. v. *J. R. Crompton & Bros. Ltd.* the court examined whether the parties had authority to exclude a legally binding effect and to deprive the courts of their jurisdiction. In *Balfour* v. *Balfour* and in *Coward* v. *Motor Insurance Bureau* the court, without having proof for an expressed intention of the parties, imputed to them the intent not to be legally bound.

The problem confronting us can thus not be solved by means of an analogy to private law.

7. One can certainly agree with the ILC that intent, designation and ratification do not provide criteria for determining the legally binding effect of an agreement (see *supra* sec. 3 of this paper). Nevertheless an apparent negative intent and a deliberate lack of formality can justify the conclusion that none of the parties wanted to be legally bound. Although negotiations took place regarding the German minorities in Denmark and the Danish minorities in Germany, their legal positions were only regulated by unilateral declarations and measures. These legal positions are evidently correlative, even though the Danish regulations may appear more generous, and no doubt a deterioration on one side would result, at the least, in "discussions" in the other country [42]). Nevertheless one cannot speak in terms of a contractually binding relationship.

It is just as certain that the *recommendations* and *vœux*, which occur in a Final Act after the convened texts are not legally binding. This conclusion follows simply from the intentional contrast in formality to the binding act.

There are, to be sure, borderline cases. M c N a i r [43]) calls attention to art. 59 of the Treaty of Berlin of 1878 which provided: "His Majesty the Emperor of Russia declares that it is his intention to constitute Batoum a free port, essentially commercial" [44]). Russia abolished the regime of free port in 1886, arguing that the above-quoted article was not an ordinary one, but instead rested upon a spontaneous declaration. The British Government protested vehemently, deriving the binding force of this article from its insertion in the treaty. It is perhaps decisive here that Russia had actually carried out its declared intention; by this action the "free port" statute, once in existence, had fallen within the treaty and could not therefore have been unilaterally put out of existence.

Preambles are difficult to classify. In most cases they provide motives for the treaty and often contain accordant statements regarding legal situations. The motives, however, are only transformed into legally binding

[42]) H. H. B i e h l, Minderheitenschulrecht in Nord- und Südschleswig, pp. 115, 114, 122.
[43]) *Loc. cit.* (note 3 above), p. 498.
[44]) M a r t e n s, NRG Series II vol. 3, p. 449.

obligations to the extent that the articles of the treaty so stipulate. On the other hand, the declarations of common views regarding a legal situation are not easily fitted into formulated articles and therefore cannot be considered immaterial simply because they appear only in the preamble.

8. The problem whether the content of an agreement, *i. e.* the nature of the act to be performed under it, may give the criterion for the legally binding effect, seems to have been extensively considered only by Myers[45]) and O'Connell[46]). The former sought to demonstrate the difference between political and international legal acts; the latter has the merit of formulating well the question, namely whether a rule of conduct is "susceptible of judicial interpretation and application". For that determination, O'Connell felt that the goal, language and action of the signatories were important.

It is certainly true that a legally relevant promise must be formulated with a certain measure of precision in order to determine, in case of a dispute, to what specific conduct each party is obligated. Such precision would be lacking, for example, if one party promised a result, the achievement of which was not dependent on that party alone. Thus, the Potsdam Protocol provided that Poland should be given additional territory in the north and the west and also that the signatories pledged themselves to support the Soviet claim to the transfer of northern East Prussia. Now the first mentioned provision lacked precision, and the second is not dependent alone upon the acts of the signatories since agreement by Germany is required for the transfer of territory.

The same is true for all agreements regarding war aims since they can only be realized through peace treaties with the enemy States. Even in a purely bilateral relationship the legal significance of an indefinite promise is limited. The *pacta de negotiando, revidendo* or *contrahendo* obligate the parties only to *bona fide* negotiations[47]), not however to the acceptance of suggestions by the other parties which would require the neglect of their own interests.

Furthermore, where the aim of the agreed upon mutual conduct must be achieved by means of an indefinite number of yet unspecified measures the expediency of which is normally to be determined at a later point in

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[45]) AJIL vol. 51, pp. 596 *et seq.*: "What a Treaty is not". See also Virally, *loc. cit.* (note 3 above). Le rôle des «principes» dans le développement du droit international, *passim.*

[46]) International Law, pp. 222 *et seq.*

[47]) Arbitral Award by President Coolidge of 4 March 1925 in the Dispute on Tacna-Arica, AJIL vol. 19, pp. 398, 402, Reports of International Arbitral Awards vol. 2, pp. 929, 933.

time, no legally binding obligation arises. That is the situation with declarations of intent and agreements regarding general policy. For this reason questions have been raised about the character of the Declaration of 5 June 1945 and of the Potsdam Protocol regarding the occupation policy to be followed in Germany (see above at notes 22, 23, 33, 34). The realization of these programmes was in the legislative and administrative competence of the military governors who could only act upon unanimous agreement in the Control Council if the measures were to be uniform throughout Germany. For the rest each military governor depended upon orders from his government, and so each measure was subject to a new political decision.

Nevertheless, one should not exaggerate and arrive at a wholesale classification of treaties as "political" with the result that they appear as inferior in effect [48]). Only the degree of precision of the individual provision can serve to determine the legal relevance.

It is submitted that one can after all form a category of agreements which are not legally binding because they do not define with sufficient preciseness the agreed-upon conduct of the parties or because this conduct does not in itself lead to the jointly desired goal, in particular when that goal can only be attained through conduct of a third party.

9. Within an existing legal system agreements are also to be found whose significance is uncertain. The so-called Gentlemen's Agreement of 1946 concerning the elections to the Security Council has already been mentioned above (at note 36). Another example is the agreement which ended, on 29 January 1966, the crisis in the European Economic Community [49]).

In international law there is, to be sure, the generally recognized principle of the freedom of treaties from requirements of form; any existing obligation or regulation can thus be changed or repealed regardless of the form of the agreement which had established them. Nevertheless, one can deduce from the circumstances that the London Agreement of 1946 and the Luxemburg Agreement of 1966 were not intended to change, respectively, the Charter of the United Nations or the Treaty on the European Economic Community. The somewhat apocryphal form suggests also that these agreements were not meant to be supplementing or authentically interpreting documents having the same force as the main texts.

Coinciding statements and decisions made during the preparatory work

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[48]) McNair, *loc. cit.* (note 3 above), pp. 501, 513.

[49]) On this point, see Mosler, National- und Gemeinschaftsinteressen im Verfahren des EWG-Ministerrats, ZaöRV vol. 26, pp. 1 *et seq.*; Dennis Thompson, The European Economic Community after the 1965 Crisis, ICLQ (1967) vol. 16, pp. 1, 6.

on treaties or statutes can, however, be considered differently, if they restate elements of general international law and explain gaps in the final text of the treaty. Two examples will illustrate this:

The right to withdraw from the United Nations, as described in the Report of the I. Commission of the San Francisco Conference of 1945 [50]), has certainly no treaty force of its own [51]); however, since the existence of such a right, according to the international law of that period, cannot be denied, one may consider that such a right had been reserved.

The prohibition against deporting the population of territory occupied during the war was not taken over from the Lieber-Code (§ 23) into the Hague Rules on Land Warfare. In the negotiations, however, of the 1st Subcommission of the 2nd Commission at the Hague Peace Conference of 1907 there was a discussion on the interning of enemy aliens in the territory of the warring States. In the course of this discussion there was unanimous agreement, stated in the proceedings, "that the measure of expulsion en masse . . . is equally forbidden" [52]).

Apart from such exceptions, the statements and agreements regarding conduct which derogates from a treaty or international statute can only be rationally explained in the following manner:

The parties to such agreements do not obey the legally binding rules, rather a concerted breach of the treaty or statute occurs. The executive organs – only these are acting in such cases – either do not assert to the fullest degree the rights of the States which they represent, or they create for themselves greater freedom from the fixed obligations. No rights or defences can be based upon such breaches because of the basic doctrine of estoppel, but in principle the treaty or international statute remains in force, so that every party has the right to demand the return to the legal procedure and the future adherence to the treaty or statutory provisions.

Above all, elections and decisions which were made in contravention of the agreements would be valid according to the main international statute and would be authoritative for the organs of the international organization, which are only bound by the statute. There arise, by the way, analogous problems in constitutional law, when State organs or, in federations, member States and the central governments enter into agreements [53]).

[50]) Doc. 1179, UNCIO vol. 6, p. 249.

[51]) Scerni, Aspetti giuridici del ritiro dalle Nazioni Unite, Comunità Internazionale 1965, p. 232. For further information see F. Münch, Archiv des Völkerrechts, vol. 13, p. 296 note 10.

[52]) The Proceedings of the Hague Peace Conference of 1907 (Carnegie Endowment Publ.) vol. 3, pp. 111–114.

[53]) For Germany, see for instance the so-called Lindau agreement, ZaöRV vol. 20, p. 116 note 102.

10. The question can now be raised whether the non-binding agreements – non-binding except that they are covered by the principle of estoppel as long as they are followed by both or by all parties – have nevertheless legal consequences. Occasionally the idea is expressed that at least the participating officials are obligated to act in accordance with their own "gentlemen's agreements". Bittner[54]) gives as an example the situation when a negotiating government promises that it will bring about the necessary parliamentary acceptance. Obviously the State, for whom the government acted, is not obligated. Bittner however feels that a government which does not then honor its promise or which fails in its attempt is obligated to resign. It is submitted that such a consequence goes too far. International law recognizes obligations on the part of subjects of international law, in recent times perhaps even on the part of individuals, but not special obligations on the part of organs of the State as such. Thus, one must agree with Lissitzyn[55]) when he expresses the opinion that all executive agreements of the USA bind not only the acting President but also his successors.

The agreements of the State organs either bind the State or they are totally non-binding. In the latter case no legal sanction can be occasioned by their breach; reprisals are, in particular, not permissible since they only can originate from a violation of a legal obligation. However, every political action which does not violate international law is permissible; above all, the other party to the gentlemen's agreement will not longer abide by it, and *modi vivendi* of a non-contractual type will collapse.

11. It appears very difficult to compress into a brief formula suitable for codification the manifold reasons for the lack of binding force of agreements between States. There will be, probably, a lacuna in the written Law of Treaties. No harm will be done if everybody is conscious of this lacuna and the ILC draft alludes to it by the formula "governed by international law". Perhaps one could say that the lack of binding force results likewise from rules of international law and that the Codification Conference had better adopt some other wording. However that may be, it would lead to uncertainty if the Conference were to return to the intent to create obligations as the criterion distinguishing the binding from the non-binding agreements because the intent is decisive only if clearly expressed by all parties to the agreement, and such clear expression is rather rare in practice.

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[54]) Bittner, *loc. cit.* (note 3 above), p. 63 note 236; see also p. 90 note 337 and p. 314.

[55]) Lissitzyn, AJIL vol. 54, pp. 870 *et seq.*